

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TERRY A. JOHNSON)
Plaintiff,) No. CV-11-0276-CI
)
v.) ORDER DENYING PLAINTIFF'S
CAROLYN W. COLVIN, Acting) MOTION FOR SUMMARY JUDGMENT
Commissioner of Social) AND GRANTING DEFENDANT'S
Security,¹) MOTION FOR SUMMARY JUDGMENT
Defendant.)
)

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 13, 19. Attorney Maureen Rosette represents Plaintiff Terry A. Johnson; Special Assistant United States Attorney Jeffrey R. McClain represents Defendant. The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for the Defendant.

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on September 2008. He alleged disability due to depression, back injury, and hearing loss.

¹ Carolyn W. Colvin became Acting Commissioner of Social Security on February 14, 2013. Under FED. R. CIV. P. 25 (d), Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 with an alleged onset date of November 19, 2002. Tr. 157, 161.
 2 Following a denial of benefits at the initial stage and on
 3 reconsideration, a hearing was held before Administrative Law Judge
 4 (ALJ) James W. Sherry on November 12, 2009. Tr. 48-84. Plaintiff,
 5 who was represented by counsel, and vocational expert Debra LaPointe
 6 testified. On January 14, 2010, ALJ Sherry denied benefits; review
 7 was denied by the Appeals Council on July 9, 2011. Tr. 1-6, 17-27.
 8 This appeal followed. Jurisdiction is appropriate pursuant to 42
 9 U.S.C. § 405(g).

10 **STANDARD OF REVIEW**

11 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 12 court set out the standard of review:

13 A district court's order upholding the Commissioner's
 14 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 15 Commissioner may be reversed only if it is not supported
 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
 16 Substantial evidence is defined as being more than a mere
 scintilla, but less than a preponderance. *Id.* at 1098.
 17 Put another way, substantial evidence is such relevant
 evidence as a reasonable mind might accept as adequate to
 support a conclusion. *Richardson v. Perales*, 402 U.S.
 389, 401 (1971). If the evidence is susceptible to more
 18 than one rational interpretation, the court may not
 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).
 21

22 The ALJ is responsible for determining credibility,
 23 resolving conflicts in medical testimony, and resolving
 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 Cir. 1995). The ALJ's determinations of law are reviewed
 24 *de novo*, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).
 25

26 It is the role of the trier of fact, not this court, to resolve
 27 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 28

1 supports more than one rational interpretation, the court may not
2 substitute its judgment for that of the Commissioner. *Tackett*, 180
3 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
4 Nevertheless, a decision supported by substantial evidence will
5 still be set aside if the proper legal standards were not applied in
6 weighing the evidence and making the decision. *Brawner v. Secretary*
7 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
8 there is substantial evidence to support the administrative
9 findings, or if there is conflicting evidence that will support a
10 finding of either disability or non-disability, the finding of the
11 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
12 1230 (9th Cir. 1987).

13 **SEQUENTIAL EVALUATION**

14 The Commissioner has established a five-step sequential
15 evaluation process for determining whether a person is disabled. 20
16 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S.
17 137, 140-42 (1987). In steps one through four, the burden of proof
18 rests upon the claimant to establish a *prima facie* case of
19 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
20 920, 921 (9th Cir. 1971). This burden is met once a claimant
21 establishes that a physical or mental impairment prevents him from
22 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),
23 416.920(a). If a claimant establishes he cannot do his past
24 relevant work, the ALJ proceeds to step five, and the burden shifts
25 to the Commissioner to show that (1) the claimant can make an
26 adjustment to other work; and (2) specific jobs exist in the
27 national economy which claimant can perform. 20 C.F.R. §§
28

1 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
2 1497-98 (9th Cir. 1984). If a claimant cannot perform other work in
3 the national economy, he is disabled and eligible for benefits. 20
4 C.F.R. §§ 404.1520(g), 416.920(g).

5 **STATEMENT OF FACTS**

6 Plaintiff was 37 years old at the time of the hearing. He
7 stated he was divorced with three minor children, had lived alone in
8 an apartment for seven years, and had a high school education and
9 two years of college with some vocational training as an auto body
10 worker. Tr. 53-56. Plaintiff reported he had past work experience
11 as a video manager, material handler, computer technician, delivery
12 driver, child care provider, retail shift manager and restaurant
13 manager. Tr. 184. He testified he lost his job, house, car, and
14 family on his claimed 2002 onset date. Tr. 63. He indicated he
15 quit his last job because his manager did not like him and claimed
16 he was not doing his job. Id. Plaintiff reported he has not worked
17 since then because no one would hire him and he eventually gave up
18 looking and was depressed. Tr. 72-73. Plaintiff testified he was
19 incarcerated between December 1, 2005, and August 18, 2008. Tr. 65.

20 **ADMINISTRATIVE DECISION**

21 The ALJ found Plaintiff meets DIB insured status requirements
22 through September 30, 2007. At step one of the sequential
23 evaluation process, he found Plaintiff had not engaged in
24 substantial gainful activity since November 19, 2002, alleged onset
25 date. At step two, he found Plaintiff had severe impairments of
26 major depressive disorder and right ear hearing loss. Tr. 19. He
27 found the medical evidence presented did not establish claimed back
28

1 pain as a medically determinable impairment or support a finding of
2 exertional limitations. Tr. 20. At step three, he found
3 Plaintiff's impairments alone or in combination equaled one of the
4 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1
5 (Listings). Id. At step four, the ALJ summarized Plaintiff's
6 testimony and determined his subjective symptom complaints were not
7 credible to the extent they are inconsistent with a residual
8 functional capacity (RFC) to perform a full range of work at all
9 exertional levels with the following non-exertional limitations:

10 [H]e cannot work in positions requiring fine hearing
11 capability; he should avoid concentrated exposure to
12 noise; although he could work where there is moderate
13 noise such as light traffic, a business office, or
14 department store; he should avoid concentrated exposure to
hazards such as dangerous machinery and unprotected
heights; he can perform both simple and more complex
tasks; and he should work away from the general public and
have no more than superficial contact with it.

15 Tr. 22, 23-25.

16 The ALJ concluded Plaintiff could not perform past relevant
17 work. Tr. 26. Proceeding to step five, the ALJ found there were
18 other jobs in the national economy Plaintiff could perform, such as
19 retail price marker, janitor, and cleaner. Tr. 27. He concluded
20 Plaintiff had not been disabled since the alleged onset date through
21 the date of the decision, and Plaintiff was not entitled to
22 disability benefits under the Social Security Act. Id.

23 ISSUES

24 The question presented is whether there is substantial evidence
25 to support the ALJ's decision denying benefits and, if so, whether
26 that decision was based on proper legal standards. Plaintiff
27 contends the ALJ erred when he found Plaintiff's complaints were not
28

1 fully credible and he failed to give proper weight to the opinions
2 of his mental health evaluators. ECF No. 14 at 11-17. Defendant
3 argues the ALJ's decision is supported by substantial evidence and
4 free of legal error. ECF No. 20.

5 DISCUSSION

6 A. Credibility

7 Plaintiff argues the ALJ did not properly reject his symptom
8 testimony. ECF No. 14 at 17. To reject a claimant's subjective
9 complaints, an ALJ must provide "specific, cogent reasons for the
10 disbelief." *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d,
11 595, 599 (9th Cir. 1999) (quoting *Rashad v. Sullivan*, 903 F.2d 1229,
12 1231 (9th Cir. 1990)). If there is no affirmative evidence of
13 malingering, the reasons must be "clear and convincing." *Lester v.*
14 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). Here, the ALJ found
15 Plaintiff's impairments could reasonably cause claimed symptoms but
16 discounted the intensity and persistence of limitation. Tr. 23-25.

17 After summarizing Plaintiff's testimony and Disability Report
18 statements, the ALJ identified specific facts, supported by the
19 record, that erode Plaintiff's credibility. For example, he noted
20 initially that there are no medical records to prove disability
21 prior to July 2006. Tr. 23. He also referenced medical reports and
22 hearing testimony that discredit Plaintiff's alleged physical
23 limitations, exertional limitations, and claimed inability to do
24 physical labor. Tr. 25, 69-70.

25 In addition to medical evidence, the ALJ enumerated other
26 reasons for finding Plaintiff's symptom allegations not entirely
27 credible. For example, he found Plaintiff's self-reported

28

1 activities of daily living did not support the level of limitation
2 claimed; observations by medical sources during evaluations in 2006
3 indicate that Plaintiff was cooperative, with a stable mood and
4 logical thought processes; Plaintiff made statements to medical
5 sources denying sleep, appetite, or mood problems; during a
6 competency evaluation, Plaintiff's examining psychologist observed
7 that Plaintiff's "depressed mood" could be related to arrest and
8 incarceration, but found no mental disease or defect; Plaintiff's
9 inconsistent statement to the prison psychiatrist regarding the
10 length of time he had been disabled; his denial to treatment
11 providers of problems with learning new tasks and problems getting
12 along with other people; and Plaintiff's unexplained failure to
13 follow up with a referral for mental treatment once he was out of
14 prison; and finally, Plaintiff's conviction for crimes of
15 dishonesty. Tr. 24-25; see, e.g., 289, 290, 363 (self-reported
16 incarcerations for insurance fraud, grand theft auto and burglary).

17 The ALJ's reasoning is supported by substantial evidence and
18 meets the standard of "clear and convincing." *Tommasetti v. Astrue*,
19 533 F.3d 1035, 1039 (9th Cir. 2008); *Burch v. Barnhart*, 400 F.3d 676,
20 680 (9th Cir. 2005); *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th
21 Cir. 1997); *Fair v. Bowen*, 885 F.2d 597, 603-604 (9th Cir.
22 1989)(claimant's failure to assert reasons for not following
23 treatment recommendations erodes credibility). As ruled by the
24 Ninth Circuit repeatedly in these proceedings, "Credibility
25 determinations are the province of the ALJ." *Fair*, 885 F.2d at 604;
26 *Sprague*, 812 F.2d at 1229-1230. It is not this court's role to
27 second-guess that determination. *Id.* The ALJ's specific reasoning
28

1 and application of ordinary techniques for assessing credibility are
 2 legally sufficient to support the Commissioner's adverse credibility
 3 findings.

4 **B. Evaluation of Medical Provider Opinions**

5 Plaintiff argues the ALJ improperly rejected functional
 6 limitations opined by Jessica Garry, M.Ed., Frank Rosekrans, Ph.D.;
 7 and Ger Moua, Ph.D. ECF No. 14 at 10-11. He contends once
 8 credited, their improperly rejected opinions support his claim of
 9 disability. Id. at 10-15.

10 At step two, the ALJ found the evidence supports a finding that
 11 diagnosed major depression disorder is a severe impairment. Tr. 19.
 12 In making this finding, the ALJ credited diagnoses from Crispin
 13 Juguilon, M.D., Ms. Garry, Dr. Rosekrans, and Dr. Moua. Id.
 14 However, the fact that an impairment is severe does not mean it
 15 precludes employment. See, e.g., *Edlund*, 253 F.3d at 1159-60; *Fair*,
 16 885 F.2d at 603; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir.
 17 1985).

18 When determining if a claimant's impairments are disabling, an
 19 adjudicator must consider medical evidence in the entire record.
 20 Medical opinions based on a claimant's subjective complaints may be
 21 rejected where the claimant's credibility has been properly
 22 discounted. *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005)
 23 (credibility properly considered in evaluating medical evidence);
 24 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001).
 25 Uncontroverted opinions of examining physicians may be rejected only
 26 with "clear and convincing" evidence. *Lester*, 81 F.3d at 830. If
 27 an acceptable medical source opinion is contradicted, it may be
 28

1 rejected for "specific and legitimate" reasons that are supported by
2 substantial evidence in the record. *Andrews*, 53 F.3d at 1043.
3 Opinions from other medical sources such as nurse practitioners,
4 mental health counselors, and physician's assistants regarding the
5 effect a limitation has on a claimant's ability to work must be
6 considered and may be rejected with specific reasons "germane" to
7 the relevant other source. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th
8 Cir. 1993).

9 **1. Dr. Rosekrans and Ms. Garry's Evaluation**

10 In September 2008, Ms. Garry, supervised by Dr. Rosekrans,
11 identified several moderate and one marked mental limitations in a
12 form summary accompanying her narrative report. Tr. 282-87. In the
13 narrative report, the evaluators questioned the validity of
14 Plaintiff's responses on objective tests and suggested the results
15 may not be reliable. Ms. Garry also noted that Plaintiff's "level
16 of distress appears to be related to situational stressors." Tr.
17 293. The ALJ properly discussed this evaluation, credited evidence
18 that supported a diagnosis of severe depression at step two, and
19 specifically discounted the marked limitation in social functioning.
20 He reasonably explained the marked severity was discounted due to
21 the evaluators' explicit observation that Plaintiff attempted to
22 portray himself in a negative manner common among individuals who
23 feign mental illness. Tr. 24, 286, 291, 292. The ALJ reasonably
24 concluded Plaintiff is limited in areas of social functioning, but
25 not to a marked degree, as evidenced by Plaintiff's expressed
26 enjoyment of time with family and desire for friends. Tr. 24. The
27 ALJ articulated specific, legitimate reasons for rejecting the
28

1 marked functional limitations assessed by Ms. Garry and Dr.
2 Rosekrans. Plaintiff's contention that the ALJ erred in evaluating
3 the Garry Rosenkrans evidence fails.

4 **2. Dr. Moua and Dr. Rosekrans**

5 The record shows Dr. Rosekrans endorsed findings by Dr. Moua,
6 who evaluated Plaintiff in March 2009. The evaluation is based on
7 results from objective psychological tests, a clinical interview,
8 and mini-Mental Status Exam. Tr. 347-58. Plaintiff argues, if
9 given proper weight, this evaluation is sufficient to establish
10 disability. ECf No. 14 at 10-11. Plaintiff argues the ALJ failed
11 to give specific and legitimate reasons for giving Dr. Moua's
12 opinions less weight than those of non-examining agency
13 psychologists who did not review the entire record. Id. at 11-12.
14 He argues the reasons given by the ALJ were "boilerplate" and
15 unsupported by the record. Id. at 12. His arguments are
16 unpersuasive.

17 The ALJ discussed Dr. Moua's March 2009 psychological
18 evaluation and found that (1) the functional limitations assessed
19 were not supported by other evidence in the record, and (2)
20 Plaintiff's impairment failed to meet the 12-month duration
21 requirement.² Tr. 25. Review of the record in its entirety shows
22 the weight given Dr. Moua's findings is supported by substantial
23 evidence. As noted by the ALJ, Dr. Moua saw no objective evidence
24 of cognitive deficits. Based on results of the Beck Depression

25
26 ² To be disabling, an impairments "must last or must be
27 expected to last for a continuous period of at least 12 months." 20
28 C.F.R. §§ 404.1509, 416.909.

1 Inventory administered, Dr. Moua opined that Plaintiff's depression
2 "would likely" preclude employment. Tr. 25. The ALJ specifically
3 did not give this finding "significant weight" because it was
4 inconsistent with Dr. Moua's own narrative findings and the evidence
5 as a whole and, even if it were credited, the impairment did not
6 meet the duration requirement. *Id.*, see Tr. 358 (claimant a "good
7 candidate for vocational rehabilitation" within six months). These
8 are legally sufficient reasons supported by other evidence in the
9 record.

10 For example, a July 2008 psychological evaluation by state
11 social worker Katrina Suckow documents that when Plaintiff was
12 compliant with his medication and mental health sessions, he was
13 stable and able to perform normal daily work activities, maintain
14 long-term employment, and exhibited only one moderate functional
15 limitation in his ability to make decisions. Ms. Suckow noted
16 Plaintiff may have problems with social settings due to his temper.³
17 Tr. 297-98. Her opinions are based on clinic notes and medication
18 reports written while Plaintiff was in the custody of the Department
19 of Corrections. Tr. 257-69.

20 In addition, clinic notes from the Community Health Association
21 of Spokane (CHAS) dated January 2009 confirm that Plaintiff was
22 stabilized on medication, seeking counseling for his depression,
23 reported increased energy and improved mood and self esteem. He
24 reported he was responding to treatment, had attended several

25 ³ To address the social setting limitation, in his final RFC
26 determination, the ALJ's found Plaintiff should work away from the
27 general public. Tr. 22.
28

1 classes, and was looking forward to attending school. Tr. 325-33.
2 A condition that can be effectively treated with medication is not
3 considered disabling. *Warre v. Commissioner of the Social Sec.*
4 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). The ALJ's evaluation
5 and weight given the Moua/Rosekrans report is supported by
6 substantial evidence and free of legal error.⁴

7 **CONCLUSION**

8 The Commissioner's denial of benefits is supported by
9 substantial evidence and free of legal error. The ALJ gave legally
10 sufficient reasons for discrediting Plaintiff's subjective
11 complaints and for discounting functional limitations assessed by
12 Drs. Moua, Rosekrans and Ms. Garry. The final RFC determination
13 addresses those functional limitations supported by the record in
14 its entirety and is a rational interpretation of the evidence.
15 Accordingly,

16 **IT IS ORDERED:**

17 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is

18 ⁴ Plaintiff's argument that Dr. Moua's estimate of duration of
19 marked limitations combined with Ms. Garry's estimated duration will
20 satisfy the Social Security Act's duration requirement is without
21 factual or legal support. ECF No. 14 at 12. Not only do their
22 combined estimates fail to equal 12 months, treatment notes from
23 January 2009 establish that within 4 months of Ms. Garry's
24 evaluation, Plaintiff's depression was stabilized on medication, his
25 energy was improved, and he was planning to attend school and look
26 for work. The unsupported duration estimate is insufficient to
27 establish the duration requirement.

1 **DENIED.**

2 . Defendant's Motion for Summary Judgment, **ECF No. 19**, is

3 **GRANTED.**

4 The District Court Executive is directed to file this Order and
5 provide a copy to counsel for Plaintiff and Defendant. The file
6 shall be **CLOSED** and judgment entered for **Defendant**.

7 DATED April 25, 2013.

8
9

S/ CYNTHIA IMBROGNO
10 UNITED STATES MAGISTRATE JUDGE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28